A

Kerajaan Malaysia v Tanjung Teras Sdn Bhd

B

HIGH COURT (KUALA LUMPUR) — ORGINATING SUMMON NO S-21–286 OF 2009
LAU BEE LAN J
5 JUNE 2013

C

Contract — Claims — Claim for work done — Subcontractor's claim for works completed — Liability — Claim under s 71 of the Contracts Act 1950 — Whether four conditions to establish claim under s 71 had been met by subcontractor — Quantum — Amount of damages due — Contracts Act 1950 s 71

D

On 24 May 2003, Pesuruhjaya Tanah Persekutuan ('PTP') entered into an agreement ('the agreement') with Jeram Permata Sdn Bhd ('JP') in respect of a piece of land situated in Kuala Lumpur ('the property'). It was a term of the agreement that JP would construct 226 units of medium costs apartments on the property and that the said project would be completed by JP on or before

E

11 November 2006. JP failed to complete the project before the completion date. By a letter dated 13 July 2007, PTP terminated its agreement with JP. The defendant was the subcontractor appointed by JP under the project. On 14 September 2007, the plaintiff, as owner of the land, gave a notice to the defendant to vacate the land. The defendant was also informed in the letter that

F

it would not be receiving any payments after the termination of the contract on 13 July 2007. The plaintiff then filed an action vide an originating summons ('OS') seeking, inter alia, a declaration that it was the owner of the property and an order for the defendant to vacate the land. In response the defendant submitted that as it had not embarked on the project gratuitously, the plaintiff

G

was under an obligation under the law to pay it as a subcontractor for the works that it had completed on the project. On 10 March 2010, the High Court declared the plaintiff to be the owner of the property and ordered the defendant to vacate the land. It also converted the OS into a writ action so that the defendant's counterclaim for compensation could be determined at a trial. The

H

plaintiff urged the court to dismiss the defendant's counterclaim of RM3,009,254.23 on the grounds that it had not given a breakdown for the amount claimed.

Held, dismissing the defendant's counterclaim with costs fixed at RM15,000:

I

(1) The defendant's counterclaim was not premised on a contractual claim but on s 71 of the Contracts Act 1950 ('the Act'). According to the Privy Council's case of *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* (*Siow Wong Fatt*'s case) four conditions had to be met to establish a claim under s 71 of the Act. Applying the ratio decidendi of *Siow Wong Fatt*'s case to

the factual matrix of the present case, it was clear that the first condition, with respect to the act being lawful, was met. The plaintiff's argument of lack of consent to the appointment of the defendant to the project was never part of its pleaded case. It is trite law that parties are bound by their pleadings. In any event, based on the documentary proof and the cross-examination of the witnesses an inference could be drawn that the plaintiff was aware of the defendant's role in the project (see paras 7–12).

(2) The second condition to be satisfied in *Siow Wong Fatt*'s case was that the act should be done for the plaintiff. In the present case, the works were performed by the defendant for JP and not for plaintiff. Hence the defendant had not fulfilled the second condition. Neither had the defendant satisfied the fourth condition in *Siow Wong Fatt*'s case, in that the plaintiff had not benefitted from the work done by the defendant because the project was not completed and the plaintiff had to appoint new contractors to complete the project. In the circumstances, the defendant's claim for compensation under s 71 of the Act could not be sustained (see paras 17 & 23).

(3) Assuming the plaintiff was liable, the amount of damages due to the defendant should be RM8,812.65. The defendant had not particularised the works it had done or provided a breakdown in respect of the remaining RM3,000,441.58 of its claim, which should thus be deducted from the total sum claimed of RM3,009,254.23 (see para 31).

[Bahasa Malaysia summary

Pada 24 Mei 2003, Pesuruhjaya Tanah Persekutuan ('PTP') memeterai perjanjian ('perjanjian') dengan Jeram Permata Sdn Bhd ('JP') berkenaan dengan sebidang tanah yang terletak di Kuala Lumpur ('hartanah'). Ia adalah satu terma perjanjian bahawa JP akan membina 226 unit pangsapuri kos sederhana di atas hartanah dan bahawa projek tersebut akan disiapkan oleh JP pada atau sebelum 11 November 2006. JP gagal menyiapkan projek sebelum tarikh siap. Melalui surat bertarikh 13 Julai 2007, PTP menamatkan perjanjiannya dengan JP. Defendan adalah sub-kontraktor yang dilantik oleh JP di bawah projek ini. Pada 14 September 2007, plaintif, sebagai pemilik tanah, memberi notis kepada defendan untuk mengosongkan tanah tersebut. Defendan juga dimaklumkan dalam surat itu bahawa ia tidak akan menerima apa-apa bayaran selepas penamatan kontrak pada 13 Julai 2007. Plaintif kemudiannya memfailkan tindakan melalui saman pemula ('SP') menuntut, antara lain, akuan bahawa ia adalah pemilik hartanah itu dan suatu perintah bagi defendan untuk mengosongkan tanah itu. Sebagai tindak balas defendan berhujah bahawa oleh kerana ia tidak memulakan projek percuma, plaintif adalah di bawah obligasi undang-undang untuk membayarnya sebagai sub kontraktor bagi kerja-kerja yang sudah diselesaikan dalam projek tersebut. Pada 10 Mac 2010, Mahkamah Tinggi mengisytiharkan plaintif sebagai pemilik hartanah dan mengarahkan defendan untuk mengosongkan tanah. Ia

juga menukarkan SP kepada satu tindakan writ supaya tuntutan balas defendan bagi pampasan boleh ditentukan pada perbicaraan. Plaintif memohon mahkamah untuk menolak tuntutan balas defendan sebanyak RM3,009,254.23 atas alasan bahawa ia tidak pernah memberikan pecahan bagi amaun yang dituntut.

Diputuskan, menolak tuntutan balas defendan dengan kos ditetapkan pada RM15,000:

(1) Tuntutan balas defendan tidak berdasarkan tuntutan kontrak tetapi pada s 71 Akta Kontrak 1950 ('Akta'). Menurut kes Privy Council *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* (*Siow Wong Fatt*) empat syarat harus dipenuhi untuk mewujudkan tuntutan di bawah s 71 Akta tersebut. Mengguna pakai ratio decidendi kes *Siow Wong Fatt* untuk matriks fakta kes ini, adalah jelas bahawa syarat pertama, berkenaan dengan perbuatan itu menjadi sah, telah dipenuhi. Hujah plaintif mengenai kekurangan persetujuan dengan pelantikan defendan untuk projek itu tidak pernah menjadi sebahagian daripada kes diplikan. Ia adalah undang-undang lapuk bahawa pihak terikat dengan pliding mereka. Dalam apa jua keadaan, berdasarkan bukti dokumentar dan pemeriksaan balas saksi suatu inferens dapat dibuat bahawa plaintif sedar akan peranan defendan dalam projek tersebut (lihat perenggan 7–12).

(2) Syarat kedua yang perlu dipenuhi dalam kes *Siow Wong Fatt* adalah bahawa tindakan itu perlu dilakukan bagi plaintif. Dalam kes ini, kerja-kerja telah dilakukan oleh defendan untuk JP dan bukan untuk plaintif. Oleh itu defendan telah tidak memenuhi syarat kedua. Defendan juga tidak memenuhi syarat keempat dalam kes *Siow Wong Fatt*, oleh itu plaintif tidak mendapat manfaat daripada kerja yang dilakukan oleh defendan kerana projek itu belum siap dan plaintif terpaksa melantik kontraktor baru untuk menyiapkan projek tersebut. Dalam keadaan ini, tuntutan defendan bagi pampasan di bawah s 71 Akta tidak dapat dikekalkan (lihat perenggan 17 & 23).

(3) Dengan mengandaikan plaintif bertanggungan, amaun ganti rugi terhutang kepada defendan adalah RM8,812,65. Defendan tidak menyenaraikan kerja-kerja yang telah dilakukan atau menyediakan pecahan berkenaan dengan baki RM3,000,441.58 daripada tuntutannya, yang dengan itu perlu ditolak daripada jumlah yang dituntut sebanyak RM3,009,254.23 (lihat perenggan 31).]

Notes

For cases on claim on work done, see 3(2) *Mallal's Digest* (4th Ed, 2013 Ressiue) paras 3767–3769.

Cases referred to

Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor [1992] 1 MLJ 166, HC (folld)

Bonham-Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177, KBD (refd)

Goh Soon Ann v Sandvik Malaysia Sdn Bhd [1984] 1 MLJ 121, FC (refd)

Great Eastern Shipping Co Ltd v Union of India AIR 1971 Cal 150, HC (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Kotah Match Factory Kotah v State of Rajasthan AIR 1970 Raj 118, HC (refd)

Kuantan Trading v Syarikat Kilang Papan Pinang, Dungun, Terengganu Sdn Bhd [1994] MLJU 382; [1994] 1 LNS 72, HC (refd)

Kumpulan Teknik Sdn Bhd v Murad Hashim Communication Sdn Bhd & Anor [2012] 8 MLJ 573, HC (folld)

Mulamchand v State of Madhya Pradesh AIR 1968 SC 1218, SC (refd)

New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation) [1987] 2 MLJ 57, SC (folld)

Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (folld)

Legislation referred to

Contracts Act 1950 s 71

Juraidah bt Abbas (Jong Kai Loon with her) (Federal Counsel, Ministry of Housing and Local Government) for the plaintiff.

Ramesh K Supramaniam (Velvashini Vembarasan with him) (George Varughese) for the defendant.

Lau Bee Lan J:

THE BACKGROUND

[1] The plaintiff filed an action against the defendant vide an originating summons on 12 October 2009 seeking the following reliefs:

(a) a declaration that the plaintiff is the owner of a land knows as HS(D): 99285 Lot No 5194 Mukim Kuala Lumpur ('the said property') and that the plaintiff is entitled to vacant possession of the said property;

(b) a declaration that the defendant as the subcontractor of the main contractor, Jeram Permata (Cheras Sdn Bhd) ('JP') are trespassers on the said land after Pesuruhjaya Tanah Persekutuan ('PTP') terminated the sale and purchase agreement dated 24 May 2003 between PTP and JP on 13 July 2007; and

(c) that the defendant vacates the said land within 14 days from this order.

[2] On 10 March 2010, the High Court:

(a) declared that the plaintiff is the owner of the said property and is entitled to vacant possession of the same;

(b) ordered the defendant, its workers or agents shall vacate the said land within 30 days from 10 March 2010; and

(c) ordered the counterclaim of the defendant for compensation has to be determined at a trial and converted the said originating summons into a writ action and the affidavits filed therein be deemed as pleadings.

[3] This instant case pertains to the defendant's counterclaim for damages of about RM50m against the plaintiff.

[4] Basically the undisputed brief facts of the case are as follows:

(a) a sale and purchase agreement was executed between PTP and JP on 24 May 2003 ('the agreement') (bundle C pp 1–102) for the purchase of the said property and JP agreed under the agreement to construct 226 units of medium costs apartments as staff quarters for the Jabatan Bomba dan Penyelamat, Malaysia ('JBPM') ('the said project');

(b) cl 27.1 of the agreement stipulates that the said project must be completed by JP within 24 months from the time the building plans approval is given to DBKL. The said approval was given on 12 November 2004, thus the completion date falls on 11 November 2006;

(c) by a letter dated 21 July 2007 (bundle B pp 76–77), PTP gave a notice of breach of contract to JP. The said notice further stated that if the breach is not remedied by JP within 30 days, the agreement will be terminated;

(d) by a letter dated 13 July 2007 (bundle B pp 78–79), notice of termination of the contract was given by PTP to JP; and

(e) by a letter dated 14 September 2007 (bundle B pp 91–92), the plaintiff gave a notice to the defendant to vacate the said land and further informed the defendant that the plaintiff will not be making any payments/compensation to the defendant after the contract was terminated on 13 July 2007.

[5] The agreed issues to be tried marked as 'F' are:

(a) whether the plaintiff has an obligation under the law to pay the defendant as a subcontractor for the works that have been completed on the said project?

(b) if the answer to the first issue is in the affirmative, what are the sums due to the defendant?

THE FIRST ISSUE

[6] The defendant submitted whilst the crux of the plaintiff's submission touches on the issue of privity of contract, the crux of the defendant's counterclaim is not premised on a contractual claim but on s 71 of the Contracts Act 1950 in that the defendant did not do the project gratuitously but the plaintiff has obtained a benefit and the defendant should be compensated. Since this is the position taken by the defendant with respect to proof of its counterclaim, I shall therefore determine the first issue focusing on s 71 of the Contracts Act 1950 rather than on the issue of privity of contract (contractual claim).

[7] Section 71 of the Contracts Act 1950 provides:

> Section 71 obligation of person enjoying benefit of non-gratuitous act
>
> Where a person lawfully does anything for another, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[8] According to the Privy Council case of *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 cited by both the parties, to succeed in a claim under s 71 of the Contracts Act, four conditions have to be met:

> That section is in terms identical with section 70 of the Indian Contract Act upon which there is some authority to which Their Lordships will later briefly refer.
>
> It has been common ground before Their Lordships *that four conditions must be satisfied to establish* a claim under section 71.
>
> The doing of the act or the delivery of the thing referred to in the section:
>
> (1) must be lawful
>
> (2) must be done for another person
>
> (3) must not be intended to be done gratuitously
>
> (4) must be such that the other person enjoys the benefit of the act or the delivery.
>
> *In Their Lordships' judgment these matters must be answered at the time that the act is done or the thing delivered and this, Their Lordships think, is of fundamental importance*. In this case the relevant time was therefore the building of the roadway in April to December, 1961.
>
> *As to the first point it is of course clear and not in dispute* that as between Mr Siow and Susur Rotan *the act was lawful*, it was clearly in the contemplation of both parties that Susur Rotan should do this work.

> *It is the second point* which in Their Lordships' judgment is decisive of this case. As a matter of phraseology the section seems clear upon it. *To bring the section into play the person when doing the act or delivering the thing must do the act 'or another person' or deliver some thing 'to him'. So that his then present intention must be to do the act or to deliver the thing for or to another.*

(per Lord Upjohn at p 120.) (Emphasis added.)

[9] In fact the principle with respect to the application of s 71 of the Contracts Act 1950 in *Siow Wong Fatt* was approved and followed in the case of *Goh Soon Ann v Sandvik Malaysia Sdn Bhd* [1984] 1 MLJ 121 where His Lordship Seah FJ delivering judgment on behalf of the Federal Court at p 123 B—F after stating:

> This section of the Contracts (sic) Act 1950 had been judicially considered by the Privy Council in the case of *Siow Wong Fatt v Susur Rotan Mining Ltd and Anor* thereafter alluded to the portion of Lord Upjohn's judgment at p 120 which is quoted in para 7.1 above.

[10] In relation to the case of *Siow Wong Fatt*, the defendant submitted, inter alia:

> In this case, although the 2nd condition was not satisfied by Susur, the Privy Council held that if the conditions of the other section are satisfied then compensation must be paid for that act if the person sued has enjoyed that benefit. Compensation must be prima facie be measured by the worth of the act done.

[11] With respect I am of the view that this statement is flawed and misleading. My reasons are as follows. The Privy Council has found that the first condition has been satisfied (see para 7.1 above). Hence since conditions 2, 3, and 4 were not fulfilled, and only condition 1 was satisfied, the Privy Council concluded that the appeal should be allowed. It is crystal clear from the dictum of Lord Upjohn, to reiterate, *It is common ground before Their Lordships that four conditions must be satisfied to establish a claim under section 71.*

[12] Applying the ratio decidendi of *Siow Wong Fatt* to the factual matrix of this present case, with respect to the first condition, I find the act is lawful. My reasons are as follows:

(a) The plaintiff submitted:

(i) the burden is on the defendant to demonstrate that the plaintiff has given written authority to JP to appoint the defendant as subcontractor and there is no such documentary evidence shown.

(ii) the plaintiff was not informed concerning the existence of the contract between JP and the defendant and SP2, Rahim bin

Mohayidin, Juru Ukur Bahan, Bahagian Pembangunan dan Pelaksanaan Projek Kementerian Perumahan dan Kerajaan and in cross-examination stated that he knew of the existence of the Agreement between JP and the defendant only after the sale and purchase agreement between PTP and JP was signed.

(iii) further, Tuan Hj Roshaizad bin Othman ('DW3'), the General Manager of the defendant testified that the defendant was appointed by JP as subcontractor to develop the 'super structure works' of the project on 15 February 2007 as per the letter of acceptance dated the same date to the defendant (bundle B pp 80–90).

(b) With respect I disagreed with the plaintiff's contention. Firstly, the argument of lack of consent to the appointment of the defendant to the project was never part of the plaintiff's pleaded case. It is trite law that parties are bound by their pleadings as per the oft-cited case of *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196.

(c) In any event, the evidence before the court based on the plaintiff's argument is without merit as when cross-examined as to whether the defendant has any documentary proof of plaintiff's approval to the appointment of defendant as subcontractor to the project, DW3 said *There are a few others but we refer to page 91 of Bundle B para 3 stating that 'Sehubungan dengan itu, pihak tuan sebagai Kontraktor Projek that is the acknowledgment*. For completeness, p 91 of bundle B is a letter from Secretary General of KPKT dated 14 September 2007 addressed to the defendant giving notice to vacate the said land.

(d) In addition based on the following evidence, an inference can be drawn the plaintiff was aware of the defendant's role in the project and the defendant has been taking instructions on the progress of the works:

(i) In cross-examination, DW3 testified:

Q: Presence of government employee at the project site does not create any contractual relationship between parties.

A: No, I do not agree.

Q: It is illogical that whenever any government employees visit a project site, a contractual relationship is formed.

A: No.

Q: Why?

A: If we do not have direction from client (Jeram) and Jeram has informed us that Jabatan Bomba and Jabatan Perumahan Negara will be supervising the project.

During our 1 project site meeting, it was checked by Tuan Soeiman.

(ii) In re-examination, DW3 stated:

> Q: Question was posed that there is nothing in the documents to show that the Government has given approval for Tanjung Teras to be appointed for this Project. Does the contract between Government and Jeram (JP) require consent/blessings from Government for the appointment of Tanjung Teras as sub contractor for this Project?
>
> A: Yes.
>
> Q: Was there any objection by Government to this appointment as sub contractor?
>
> A: During the briefing for the tender for the Project, the prerequisite for us to be able to tender is the registration with PKK (Pusat Khidmat Kontraktor) and CIDB (Construction, Industrial Development Board). These 2 agencies are also Government.
>
> Jeram also mentioned that they also will have to get consent from their client which after the appointment, we have to submit our company profile to JPN and Jabatan Bomba dan Penyelamat.

[17] With respect to the second condition, the court has to consider whether the works were done by the defendant for the plaintiff or otherwise and the court is mindful it must be considered 'at the time that the act is done or the thing delivered'. DW3, Tuan Hj Roshaizad bin Othman stated that the works were performed by the defendant for JP and in consideration thereof, the defendant will be paid by JP. Hence the defendant has not fulfilled the second condition to show that the works were done for the plaintiff.

[18] In relation to the fourth condition, since the works were performed by the defendant for JP, it is JP who has benefitted and not the plaintiff. In consideration for the works done, the sum of RM50,548,000 will be paid to JP, out of which it is undisputed a sum of RM16,444,072.19 has been paid (bundle B pp 42–46, bundle C pp 136–160, bundle D pp 1–2).

[19] DW3 stated that on numerous occasions the defendant has requested to the plaintiff or plaintiff's agent to compensate the defendant for the work done for which the plaintiff had obtained benefit in that the plaintiff revived the project and appointed new contractors to continue to build the apartments on the super structure works done by the defendant.

[20] I find the plaintiff has not benefitted from the work done by the defendant because the project was not completed and the plaintiff had to appoint new contractors to complete the project when in fact it was an agreement between defendant and JP to build 226 units of apartments on behalf of JP.

[21] As for the Indian cases of *Mulamchand v State of Madhya Pradesh* AIR 1968 SC 1218, *Great Eastern Shipping Co Ltd v Union of India* AIR 1971 Cal 150 and *Kotah Match Factory Kotah v State of Rajasthan* AIR 1970 Raj 118 cited by the defendant, I am guided by the approach taken by the Supreme Court in *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (in liquidation)* [1987] 2 MLJ 57, where in responding to the various authorities referred by the parties, including Indian authorities at p 68 B-D left column opined:

> We do not consider it necessary to deal with the various authorities cited but would refer only to *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor*. There the Privy Council held, inter alia, that four conditions must be satisfied to establish a claim under section 71 of the Contracts (Malay States) Ordinance, 1950. The doing of the act or the delivery of the thing referred to in the section:
>
> 1) must be lawful;
> 2) must be done for another person;
> 3) must not be intended to be done gratuitously;
> 4) must be such that the other person enjoys the benefit of the act or the delivery.

[22] I will adopt a similar approach with respect to the High Court cases of *Aw Yong Wai Choo & Ors v Arief Trading Sdn Bhd & Anor* [1992] 1 MLJ 166 at pp 182–183 and *Kumpulan Teknik Sdn Bhd v Murad Hashim Communication Sdn Bhd & Anor* [2012] 8 MLJ 573 at p 574 and hold that all this court need to do is to follow the principles set out in the case of *Siow Wong Fatt* and apply the same to the facts of this instant case.

[23] To sum up, I find the defendant has not satisfied the second and fourth conditions out of the four conditions spelled out in *Siow Wong Fatt* and therefore I am of the view that the defendant's claim for compensation under s 71 of the Contracts Act 1950 cannot be sustained.

The second issue

[24] In the event I err in my finding on the first issue, I shall now consider the second issue namely, assuming if the plaintiff is found to be liable to compensate the defendant under s 71 of the Contracts Act, what then are the sums due to the defendant?

[25] The defendant submitted on the issue of quantum through Kuh Cho Sen (DW1), a quantity surveyor attached to the firm of Juru Kos, appointed by JP in respect of the project and Ar Jason Low Chee Eng, an architect and partner of JLA/Architect, the firm appointed by JP as project architect. The

defendant submitted — (i) the witnesses testified based on bundle E which contain the certificates determining the value of works done by the defendant for the project, the valuation of works were done by the surveyor, and subsequently certified by the architect; (ii) it is undisputed that the total amount certified for progress claims No 1, 2 and 3 amounted to RM2,708,328.81; and (iii) the defendant claimed by is RM3,009,254.23, being the sum of RM2,708,328.8 plus the retention sum of RM300,925.42.

[26] Based on the affidavits before the court which were ordered by the court to stand as pleadings when the originating summons was converted to a writ action, I agreed with the plaintiff's submission that the defendant did not particularise the works done by the defendant and the particulars of claim in respect of the same. The plaintiff has urged the court to dismiss the defendant's counterclaim of RM3,009,254.23 on account of this alone.

[27] I am not inclined to do so because of the circumstances of this case in that there are no normal pleadings as in a normal writ action. It is not disputed that the defendant's counterclaim was ordered to proceed to trial and the affidavits are to stand as pleadings.

[28] The burden is on the defendant to prove its damages as per the principle in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p 178 cited by His Lordship Arifin Zakaria J (as he then was) in *Kuantan Trading v Syarikat Kilang Papan Pinang, Dungun, Terengganu Sdn Bhd* [1994] MLJU 382; [1994] 1 LNS 72).

[29] The plaintiff submitted the following items ought to be deducted from the RM3,009,254.23:

(i) liquidated ascertained damages (LAD) calculated in this manner:

LAD (12.11.2006-13.7.2007) (244 *hari*)	=	RM3,379,099.88
1 *hari* LAD	=	RM3,379,099.88/244
	=	RM13,848.77
(1.5.2007-13.7.2007) (63 *hari*)	=	RM13,848.77 X 63 *hari*
	=	RM872,472.51

(ii) preliminaries of RM1,354,184.50 as the defendant was unable to give details of the breakdown for this amount,

(iii) variation order for RM205.412.90 as DW1 and DW2 agreed there was no order for variation given by the plaintiff to the defendant,

(iv) materials on site for RM267,446.25 as there was no proof of the same,

(v) retention sum of RM300,925.42 ought to be deducted as DW3 agreed that the retention sum was held by JP and this sum has been deducted from the amount of RM3,009,925,42 (bundle B p 25).

[30] I accept the plaintiff's submission that all the items (i) to (v) totalling RM3,000,441.58 have to be deducted from RM3,009,254.23 leaving a balance of RM8,812.65.

CONCLUSION

[31] For the foregoing reasons on a balance of probabilities, on the issue of liability, since the defendant has not fulfilled the second and fourth conditions out of the four conditions required as laid out in *Siow Wong Fatt* in order to succeed in a claim under s 71 of the Contracts Act 1950, I dismissed the defendant's claim with costs fixed at RM15,000. On the issue of quantum, assuming the plaintiff is liable, the amount of damages due to the defendant is RM8,812.65.

Defendant's counterclaim dismissed with costs fixed at RM15,000.

Reported by Kohila Nesan